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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/601,241

06/20/2003

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5600-84

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24978 7590 08/27/2007
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EXAMINER

MI, QIUWEN

ART UNIT

PAPER NUMBER

1655

MAIL DATE

DELIVERY MODE

08/27/2007

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	10/601,241	SIMMONS ET AL.	
	Examiner	Art Unit	
	Qiuwen Mi	1655	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 23 July 2007.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-21 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-21 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date <u>6/20/03</u> . | 6) <input type="checkbox"/> Other: _____ |

Art Unit: 1655

DETAILED ACTION

Election/Restrictions

Applicant's election without traverse of Group I, claims 1-21, in the reply filed on 7/23/2007, is acknowledged.

Claims Pending

Claims 1-21 are pending. Claims 22-30 are cancelled. Claims 1-21 are examined on the merits.

Claim Rejections –35 USC § 112, 1st

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claims 2-6 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. Cancer cannot be prevented. There is no evidence that one would not ever get cancer by consuming the claimed liquid composition. Unless Applicant can show on the record that

Art Unit: 1655

cancer would be completely prevented in every instance, Applicant is requested to cancel the word "preventing".

Claim Rejections –35 USC § 101

35 U.S.C. 101 reads as follows:

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

Claims 2-6 are rejected under 35 U.S.C. 101 because the claimed invention is not supported by either an asserted utility or a well established utility. The claim 2 recites preventing cancer. The broadest reasonable interpretation of the term pathological condition merely requires that one person gets cancer. There is no evidence that cancer would be prevented, therefore the utility would not be credible.

Although claims 3-5 are not specifically recited for "preventing", because these claims are dependant upon claim 2, claims 3-5 necessarily comprise all of the limitations of claim 2. thus, these claims are also properly rejected under this statute.

Claim Rejections –35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Art Unit: 1655

Claims 1-21 are rejected under 35 U.S.C. 103(a) as being unpatentable over the combination of Anzaghi et al (US 2004/0166179), Jung (KR 2001096327), Yamawaki et al (US 4,696,929), as evidenced by Rochat et al (US 2004/0219157)*.

Anzaghi et al disclose a composition in drinkable solutions [0061] (liquid) for treating inflammation [0061] comprising 0.4-30% inulin, decaffeinated green tea dry extract, 50% in polyphenols at concentrations of 0.1%-2% (g/100 ml), blueberry dry extract, 25% in anthocyanidins, catechins and epicatechins (see claim 9) and vitamin C (the same as ascorbic acid) at concentrations of 0.2-2% (g/100 ml) [0019]. Anzaghi et al also teach citric acid in the liquid compositions [0036]. Anzaghi et al further teach that the invention increases the solubility and absorption of the components [0013].

As evidenced by Rochat et al, inulin extract is commonly known as fructoligosaccharides [0027].

Anzaghi et al do not explicitly disclose the incorporation of fructoligosaccharides, citric acid, into their composition. Anzaghi et al do not a liquid composition being in a pH range of 4.7-5.0.

Jung discloses a drink (liquid) for treating inflammation comprising liquid fructooligosaccharide, vitamin C, and citric acid (see Abstract).

Yamawaki et al disclose a liquid preparation (col 5, lines 10-15) for treating inflammation (see Title). Yamawaki et al also teach that typical buffers include sodium citrate (col 5, lines 18-

Art Unit: 1655

22), examples of pH-adjusting agents including citric acid etc, and stabilizers include EDTA (col 5, lines 25-30). Yamawaki et al further teach that the composition has excellent anti-inflammatory action (col 1, lines 28-33).

Rochat et al teach short chain fructooligosaccharide (it is inherent that it has a maximum degree of polymerization) [0047; 0048] for treating inflammation (see Title). Rochat et al also teach that the nutritional formula is preferably in the form of a liquid concentrate etc [0043].

"It is *prima facie* obvious to combine two compositions each of which is taught by the prior art to be useful for the same purpose, in order to form a third composition to be used for the very same purpose.... [T]he idea of combining them flows logically from their having been individually taught in the prior art." *In re Kerkhoven*, 626 F.2d 846, 850, 205 USPQ 1069, 1072 (CCPA 1980) (citations omitted) (Claims to a process of preparing a spray-dried detergent by mixing together two conventional spray-dried detergents were held to be *prima facie* obvious.).

It would have been obvious to one of ordinary skill in the art at the time the claimed invention was made to combine the instant compositions for their known benefit since each is well known in the art for treating inflammation. This rejection is based on the well established proposition of patent law that no invention resides in combining old composition of known properties where the results obtained thereby are no more than the additive effect of the compositions, *In re Sussman*, 136 F.2d 715, 718, 58 USPQ 262, 264 (CCPA 1943).

Accordingly, the instant claims, in the range of proportions where no unexpected results are

Art Unit: 1655

observed, would have been obvious to one of ordinary skill having the above cited references before him.

Therefore, it would have been *prima facie* obvious for one of ordinary skill in the art at the time the invention was made to combine the inventions of Anzaghi et al, Jung, Yamawaki et al, and Rochat et al since all of them teach compositions for treating inflammation individually in the art. Since all the compositions yielded beneficial results treating inflammation, one of ordinary skill in the art would have been motivated to make the modifications. Regarding the limitation to the amount of the components or the pH of the composition, the result-effective adjustment in conventional working parameters is deemed merely a matter of judicious selection and routine optimization which is well within the purview of the skilled artisan, which is dependent on inflammatory condition or the stability of the composition that is needed.

From the teachings of the references, it is apparent that one of the ordinary skills in the art would have had a reasonable expectation of success in producing the claimed invention.

Thus, the invention as a whole is *prima facie* obvious over the references, especially in the absence of evidence to the contrary.

*This reference is cited merely to relay an intrinsic property and is not used in the basis for rejection *per se*.

Conclusion

No claim is allowed.

Art Unit: 1655

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Qiuwen Mi whose telephone number is 571-272-5984. The examiner can normally be reached on 8 to 5.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Terry McKelvey can be reached on 571-272-0775. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Qiuwen Mi

/Patricia Leith/
Patricia Leith
Primary Examiner
Art Unit 1655